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THE PLACE OF THE JURISDICTIONAL IMMUNITY OF STATES IN INTERNATIONAL AND MUNICIPAL LAW

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THE PLACE OF THE JURISDICTIONAL IMMUNITY OF STATES IN INTERNATIONAL AND MUNICIPAL LAW

One never ceases to be surprised at the vitality of the traditional topics of public international law. Today jurisdictional immunity is again a major topic of legal interest[1], throwing up new questions, such as the immunities of international organizations and of their archives[2]. Both the Institut de Droit International and the International Law Association have embarked upon major new investigations of this subject; it has already been the subject of extensive study by the International Law Commission and the Afro-Asian Consultative Committee. It is not the purpose of this lecture to attempt another contribution to a technical investigation of the topic as such[3]; my purpose is rather to look at the place of jurisdictional immunities in the general context of international law, and of municipal law.

It will be useful at the outset of this inquiry to remind ourselves of the similarity of the principle of the jurisdictional immunity of States before domestic courts of other States, and the consensual principle of

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1 For the historical origins of the doctrine, see Sinclair in Hague Recueil des Cours, Vol. 167, pp. 177 ff.

2 See e.g. some of the issues raised in the litigation, before English courts, concerning the Tin Council, of which there is an excellent summary by Sands in N.I.L.R., Vol. XXXV (1988).

3 For this see especially the magesterial reports of Ambassador Sucharitkul: YB 1979, II (Pt. one), p. 227, doc. A/CN.4/323; YB 1980, II (Pt. one), p. 199, doc. A/CN.4/331 and Add. 1; YB 1981, II (Pt. one), p. 12, doc. A/CN.4/340 and Add. 1; YB 1982, II (Pt. one), p. 199, doc. A/CN.4/357; YB 1983, II (Pt. one), p. 25, doc. A/CN.4/363 and Add. 1; YB 1984, II (Pt. one), p. 1, doc. A/CN.4/376 and Add. 1 and 2. The final draft agreed by the I.L.C. is in G.A. 41st Session (1986), Sup. 10 (A/41/10). See also, Higgins in N.I.L.R., Vol. XXIX (1982), p. 265; Ress, Entwicklungstendenzen der Immunität ausländischer Staaten, in ZaöRV, Vol. 40 (1980), p. 217, and in International Law and Municipal Law, German/Argentinian Colloquium (1979), pp. 67-93.

jurisdiction of international courts such as for example the International Court of Justice[4]. This relationship is not always evident from the text books, nor indeed remarked by commentators. But jurisdictional immunity in the absence of waiver, and jurisdiction created by consent, are the obverse and reverse of the same coin. In either case it is State sovereignty that is the underlying rationale and historical cause. Of course, the municipal court normally has compulsory jurisdiction, so waiver means that jurisdiction "flows again"; the international court normally does not have jurisdiction, so consent makes the jurisdiction flow for the first time. Yet, the similarities of the immunity principle of domestic courts, and the consensual principle of international jurisdiction, are so marked that it can be misleading to consider the one without some reference to the other.

That the consensual nature of international jurisdiction is a principle of public international law cannot be doubted. There has, however, in the past been occasional controversy whether jurisdictional immunity before municipal courts derives from a rule of international law or only from considerations of comity enshrined in municipal laws[5]. No doubt there may be problems in attempting to derive a rule of international law from the practice which differs so much from one municipal jurisdiction to another. Yet it is difficult to see how immunity can be

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4 Two citations from the rich jurisprudence will suffice. In the Anglo-Iranian Oil case (I.C.J. Reports 1952, p. 103), the Court referred to:

> "... the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction."

In the Ambatielos case, second phase (I.C.J. Reports 1953, p. 19) the Court referred to:

> "... the principle, which is well established in international law, and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration without its consent".

5 See remarks of M. Leigh in State Immunity: Law and Practice in the United States and Europe - proceedings of a conference of the I.L.A. on 17 November 1978.

denied the status of a rule of international law when certain constituents of the same general principle - e.g. the immunity enjoyed by visiting heads of State, or foreign warships in port, as well as on the seas - have all the marks of firm and general public international law. Diplomatic immunities, - of those who represent the sovereign, and which immunities can be waived by him - have recently been confirmed as rules of international law by the International Court of Justice[6].

Nevertheless, there are problems about the interaction between public international law and municipal law in this matter. As long as municipal courts were generally inclined towards a strict view of immunity, the disputed questions could revolve mainly around consent, and around what action amounts to waiver of immunity. But the rapid development in recent decades of a restricted view of immunity has brought great changes in the law, apparently with the acquiescence of governments, for protests have certainly not been prominent, if they have existed at all. This development in the rule of international law, however, was initially brought about by a developing practice of municipal courts sometimes assisted at a later stage by legislation. If we want to trace these developments, we must look at a developing State practice as it appears in decisions of municipal courts to be consulted in the various law reports[7]. That changing jurisprudence within the municipal law has resulted in important changes in international law itself, appears very clearly from the well-known judgment of Lord Denning in the English Court of Appeal (the parties settled before appeal to the House of Lords) in Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria (1977) 2 WLR 356; 16 ILM 471 (1977). Jurisdictional immunity in English law had, Lord Denning was saying, failed to keep up with changes in the rule of international law to suit modern conditions. For the change in

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6 See Iranian Hostages case, I.C.J. Reports 1980, p. 3.

7 See also Goff J. in the Congreso case, discussed below, where he says: "In the course of the argument before me, I was referred to a considerable number of foreign authorities. It is clear that, in a case such as the present, which is concerned with a doctrine of public international law, it was proper that I should be so referred ...".

international law, he looked to see what the courts of other countries were doing, and then said:

> "Seeing this great cloud of witnesses, I would ask: Is there not here sufficient evidence to show that the role of international law has changed? What more is needed? Are we to wait till every other country save England recognises the change? Ought we not to act now? Whenever a change is made someone sometime has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind the bank."

This 'restricted' view of immunity, which has developed in recent decades, has not resulted merely from an extension of the idea of consent or even of notional consent. It is rather the development of an area of authentic non-immunity, where waiver is irrelevant. It is an area where the court claims and exercises jurisdiction even against an unwilling State-defendant. What then is the rationale of this claim to non-consensual jurisdiction over a foreign sovereign State; is it indeed possible to find a factor that is common to so many different municipal jurisdictions, when the methods, arguments and the reasons of decisions will often vary so considerably from one jurisdiction to another? And when, moreover, the tendency for a restrictive jurisdictional immunity law to be consolidated in legislation - e.g. the U.S. Foreign Sovereign Immunities Act, 1976; the U.K. State Immunity Act, 1978; and the Australian States Immunities Act, 1985 - has rather made the differences all the sharper; for inevitably such legislation reflects the differing constitutional laws, or a particular view of the relationship between municipal law and international law.

The U.K. Act of 1978, in its introductory words, recites "... the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts". There is no mystery about the provenance of this general tendency to extend the class of non-immunity cases. The extension has been prompted by the modern practice of governments to engage more and more in commerce, often through public corporations created for that very purpose[8]. In

8 See Higgins, op.cit.: "The developments in State immunity have been

short, governments are now found frequently to engage in transactions, often purely commercial, with foreign private individuals, or foreign corporations; which transactions are not only intended to take their juridical life and meaning from a system of municipal law, but could hardly do otherwise, since public international law simply does not contain any system of commercial law. Is the position then merely that the change is one of quantity? Is it just that there are more such cases than there used to be; and that these cases are still to be solved in the same way as the venerable students' puzzles about boots for the army, or chandeliers for the embassy? Clearly not; the change is fundamental.

It is at this point useful to recall that, in this non-immunity area, the municipal court is exercising jurisdiction over a foreign sovereign, irrespective of his consent or waiver, and in the knowledge that he may have been acting qua sovereign, though doing what a private person may do. As Sir Gerald Fitzmaurice once pointed out, when criticising the classic distinction between an actus jure imperii and an actus jure gestionis, "a sovereign State does not cease to be a sovereign State because it performs acts which a private citizen might perform"[9].

If it were not so, there would be no problem. It is precisely because sovereigns nowadays act as private citizens also act whilst never for a

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a self-generated response to the requirements of the contemporary commercial world and to notions of stability, fairness and equity in the market place."

9 Fitzmaurice, State Immunity from Proceedings in Foreign Courts, in B.Y.I.L., Vol. 14 (1933), at p. 121. See also Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, in B.Y.I.L., Vol. 28 (1951), pp. 220-272, at p. 224: "Moreover, it is no longer generally accepted that the economic activities of the state - such as state management of industry, state buying, and state selling - are necessarily of a purely 'private-law nature'; that they are 'jure gestionis'; and that in engaging in them a state acts like a private person. In these and similar cases ostensibly removed from the normal field of its political and administrative activities, the state nevertheless acts as a public person for the general purposes of the community as a whole."

moment ceasing to be sovereigns, that the problem can no longer be solved simply by asking whether the sovereign is impleaded; or even whether the transaction has a "public" purpose.

If the criterion is not to be found in the purpose of the State transaction or activity concerned, it seems reasonable then to turn to the nature or character of the transaction or activity[10], and to attempt to establich categories of acts, such as, for example, those of a "commercial" nature[11]. Even so, there is a question whether one has done much more than to move from one insufficient criterion to another. Thus, for example, the U.K. State Immunity Act of 1978, after providing (s.3) that a State is not immune in respect of a commercial transaction, goes on to say that the term "commercial transaction" means, inter alia, "(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority". This can lead perilously near to saying, if one may translate the provision into the terms of the classical criterion, that an actus jure gestionis is one that is not done jure imperii. But that leads straight back into the dilemma posed by Sir Gerald Fitzmaurice. Are not even the commercial activities of sovereigns done by sovereign authority, and indeed for public purposes? The only way out of the dilemma is that now appearing more and more in the jurisprudence: that is to interpret "in the exercise of sovereign authority" as excluding the doing of something which an ordinary private person might also do. Then the test is indeed capable of being used to define the limits of a

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10 See, for example, The Empire of Iran case in the West German courts, in I.L.R., Vol. 45, p. 57: "As a means of determining the distinction between actus jure imperii and jure gestionis one should rather refer to the nature of the state transaction or the resulting legal relationships,and not to the motive or purpose of the state activity. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law" - this passage is cited by Goff J. in the Congreso case dealt with below.

11 The U.S. Act of 1976, in s. 1603 (d), provides: "The commercial character of an activity shall be determined by reference to the nature of the cause of conduct or particular transaction, rather than by reference to its purpose."

non-immunity area.

In consulting the methods and tests employed in particular municipal decisions or legislation, we should recall that our purpose is not an exercise in comparative law; the purpose is to try to discover what is the international law rule on the subject? And it is well to remember that the rule of international law will be one which defines, or limits, the cases where immunity from jurisdiction ought to be allowed, rather than one defining the area of non-immunity. Beyond that limit, or threshold, municipal jurisdictions are free to follow their own traditions. At the time, for instance, when English courts applied an absolute view of immunity, even long after international law permitted a more restricted view, there was nevertheless surely no breach of international law involved.

Seeing the matter thus enables one to see what one might call the area of non-immunity in a different perspective; not so much as a remnant of jurisdiction after the requirements of immunity have been satisfied, as an assertion of jurisdiction over States in a certain class of case. It also enables one to distinguish some considerations which are relevant to the question of the existence of municipal jurisdiction in a particular case, rather than to any question of immunity.

Consider for example the European Convention on State Immunity, because this is not an attempted codification of a common law of State immunity, but rather a scheme of cases where parties should be able to agree that a State cannot claim immunity, the purpose being to serve as the foundation for a common procedure for execution of decisions rendered in such cases[12]. This attempt to reach a list of non-immunity cases that would serve as a sort of lowest common denominator, makes the instrument of great interest for a general view of the law. This list of cases, ex-

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12 See Sinclair, op. cit., p. 141: "The Convention is accordingly dual purpose. It embodies a catalogue of the cases in which a foreign State may not claim immunity (corresponding approximately to the content of activities jure gestionis), but attaches to each of the cases included in the catalogue a connecting link establishing a jurisdictional basis

pressed as a list of exceptions to a general immunity principle, is in Articles 4 to 11 of the Convention. According to Article 4, a contracting State cannot claim immunity from the jurisdiction of the courts of another contracting State, "if the proceedings relate to an obligation of the State which, by virtue of a contract, falls to be discharged in the territory of the State of the forum". Again, in Article 5, it is provided that:

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum."

This pattern is repeated consistently in the succeeding articles: Articles 6 and 7 except from immunity certain matters arising from participation by the defendant State "in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the State of the forum", or where a contracting State engages in a business from "an office, agency or other establishment", which is "on the territory of the State of the forum"; Article 8 applies the same territorial qualification to patents, industrial designs, trade-marks, service-marks or similar rights, or their infringement; Article 9 applies it to immovable property "situated in the territory of the State of the forum"; or, in Article 10, to a claim to movable or immovable property arising by way of succession, gift or bona vacantia; and finally Article 11 extends the exceptions to "redress for injury to the person or damage to tangible property", provided "the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred".

Thus, the common factor in all these provisions defining "exceptions" to immunity is a territorial connection[13]. Yet this is not truely a factor

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sufficient to warrant recognition and enforcement of the resulting judgment on the international plane". See also Sinclair, in I.C.L.Q. Vol. 22 (1973), pp. 254-284.

13 See also s. 1605 of the U.S. Act of 1976 which also speaks of commercial activities with "direct effects within the United States", as cases where the immunity does not apply.

which is relevant to immunity at all. Indeed, in some of the most uncontroversial cases of entitlement to immunity - the visiting Head of State, or a visiting warship - immunity is clearly owed even though there is a territorial presence. What it certainly is relevant to, is the jurisdiction of the local municipal court[14]. The territorial presence or connection makes the exercise of that jurisdiction appropriate, often the only one that can usefully be moved. So, this kind of definition of the area of non-immunity is essentially an assertion of municipal jurisdiction.

It need occasion no surprise that cases of non-immunity, where sovereign States have become subject to a significant amount of compulsory jurisdiction, are often cases where the court in question is an instrument of a territorial sovereignty wherein the subject matter of the action has a particular connection. For competence, both juridically and physically in respect of persons and property within the territory of the forum is the normal basis of curial power and authority. Thus, the municipal court, in this territorial situation, has a source of peculiar appropriateness, authority and practicality, which, incidentally, an international court lacks almost by definition.

The significance of territorial authority and appropriateness to the development of a more 'restricted' view of jurisdictional immunity has been remarked upon before now. Professor Brownlie noticed it in the 1979 (3rd) edition of his Principles of Public International Law, and recently as special rapporteur to the Institut de Droit International[15]. Also it

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14 See Higgins, op.cit., at p. 273: "The continuing protection of immunity granted to a foreign State for acts having no territorial connection with the forum are, in the speaker's view, not properly a question for sovereign immunity at all. This requirement of 'connection' reflects a feeling that courts should not pronounce upon the acts of a foreign sovereign that are so far removed from their own concern. But this is really a question of jurisdiction, not of immunity."

15 See Annuaire, 1987 (Cairo), Vol. I.

has been explained by Sir Ian Sinclair[16], and I should like to quote part of what he says about it. After pointing out that the classical judgment of Chief Justice Marshall in Schooner Exchange v. McFaddon[17] "is based fundamentally on the principle that 'the jurisdiction of the nation within its own territory is necessarily exclusive and absolute'", he continues:

> "If one takes this as the starting point it will be seen that the whole topic of sovereign immunity appears in a new light. It operates by way of exception to the dominating principle of territorial jurisdiction. In other words, one does not start from the assumption that immunity is the norm, and that exceptions to the rule of unanimity have to be justified. One starts from the assumption of non-immunity, qualified by reference to the functional need (operating by way of express or implied license) to protect the sovereign rights of States operating or present in the territory".

This approach now also sheds light upon the otherwise puzzling relationship of jurisdictional immunity and 'act of State doctrine'. Is a court's refusal to exercise jurisdiction over a sovereign as defendant different in principle from a court's refusal, in a case between other parties, for example, to question the validity and effectiveness of a sovereign's legislation within his own territory[18]? There is of course one difference between a court applying jurisdictional immunity and a court applying act of State doctrine. In the first case - jurisdictional immunity - the court dismisses the entire case because it lacks jurisdiction. In the second - act of State doctrine - it usually not only exercises its jurisdiction but decides the case; this however on the basis that, for example, the validity and effectiveness of a relevant foreign nationalization statute cannot be questioned. In the one case the court refuses to decide the case and indeed refuses even to look at it; in the second it actually decides the case and the matter becomes res judicata.

There is, however, a further, and related, difference. In the jurisdictional immunity case a waiver will recreate the jurisdiction; but in the act

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16 Op.cit., p. 215.

17 Cranch Vol. 7, p. 116.

18 See e.g. Luther v. Sagor (1921) 3 K.B. 532; or, in more recent times, Buttes Gas & Oil v. Hammer, (1982) A.C. 888.

of State kind of case, even consent will not confer jurisdiction. In the one kind of case, immunity is superimposed on an existing jurisdiction; in the other there is no initial jurisdiction which an immunity could affect. In short the act of State kind of case is not about immunity or non-immunity but about proper limits of municipal jurisdiction[19].

Thus to separate the question of jurisdictional immunity from the entirely different question of jurisdiction or competence, is essential for an understanding of the modern law of immunity. Then it is seen very clearly that, in Sinclair's words, the dominating principle is that of territorial jurisdiction and immunity is seen as the exception. The effect of this tendency is well illustrated by an English case which is particularly instructive because it goes to the edge of the law. I refer to the decision of the House of Lords in the case of I Congreso del Partido. The facts of the case are well-known[20]. Suffice it for present purposes to say that it arose out of an action in rem against an ordinary trading vessel owned by the defendant sovereign government, that vessel having itself had nothing to do with the events surrounding the fall of the Allende Government in Chile, and Cuba's reaction thereto, out of which the claim sought to be enforced arose.

In the High Court, and in the Court of Appeal, the view of Cuba that it was entitled to immunity was accepted[21]. In the House of Lords the deci-

19 See Brownlie in his Report to the Institut de Droit International (Cairo 1987, Vol. I) who gives a very useful list of cases, which he excludes from a study of jurisdictional immunity, because they deal in his view not with immunity but with 'incompetence'. This is, with respect, correct. Brownlie also mentions that these cases have sometimes been put under the rubric of "immunity ratio materiae". This nomenclature is, however, misleading. They are not immunity cases in a proper sense of the word.

20 They are fully set out in the Judgment of the High Court (1978) I.Q.B. 500; I.L.R., Vol. 64, p. 154; for the Court of Appeal, see (1981) 1 All. ER 1092; I.L.R., Vol. 64, p. 227; for the House of Lords, see (1983) A.C. 244; I.L.R., Vol. 64, p. 307. For a characteristically clear and economical statement of the facts, see Lord Denning M.R. in the Court of Appeal.

21 The Court of Appeal was equally divided, so the Judgment of the Court below prevailed.

sion was reversed. Nevertheless, although there was a difference of opinion about the proper juridical interpretation of the facts of the case, all these courts were nearer together in their view of the law of immunity than might at first impression be supposed. In all three courts it was accepted that the question concerned the meaning and scope of the "restrictive" theory of immunity, which was agreed to have replaced the former absolute theory. There was substantial agreement in the three courts on accepting the nature-of-the-act test rather than the purpose-of-the-act test; and there was also general acceptance that the nature of the act is normally to be discovered by asking whether the act, or transaction, was something a private citizen could have done. There was even seeming agreement in rejecting the proposition, put forward strongly by the plaintiffs, that once the sovereign has entered the market place, he is always bound to perform his contract, and may not plead sovereign immunity in respect of it by taking further steps in a sovereign capacity[22]. The House of Lords differed from the courts below principally in their interpretation of the nature of the acts in question, looking only to whether they were such that a private person might have done them, and refusing to take into account even an obvious political purpose.

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22 Put persuasively by Goff J. in a telling example (p. 528 of the Report in I.L.R., Vol. 64, p. 179):

"Suppose that a foreign sovereign, whose country is threatened with invasion, seizes strategic materials which are being carried on some of his ordinary trading ships. Again, it is difficult to believe that the sovereign could not claim immunity in respect of a claim for conversion of the goods; indeed, even if the sovereign was a party to the contracts of affreightment under which the goods were being carried on his ships, and such contracts could be characterized as jure gestionis, he should surely be entitled to immunity. To assert jurisdiction in the case of such claims would be inconsistent with the power and dignity of the sovereign. The claims would be more appropriately dealt with through diplomatic channels than through the courts of another country. Such an act is an actus jure imperii; it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform".

The restrictive theory, according to the speech of Lord Wilberforce in the House of Lords, arose "from the willingness of States to enter into commercial, or other private law, transactions with individuals":

> "The question arises, therefore, what is the position where the act upon which the claim is founded is quite outside the commercial, or private law, activity in which the state has engaged, and has the character of an act done jure imperii" (at p. 263).

And again:

> "The activities of states cannot always be compartmentalised into trading or governmental activities; and what is one to make of a case where a state has, and in the relevant circumstances, clearly displayed, both a commercial interest and a sovereign or governmental interest?" (p. 264)

On this question Lord Wilberforce had some very interesting things to say, especially in regard to one of the vessels, the Playa Larga[23]:

> "I do not think that there is any doubt that the decision not to complete the unloading at Valparaiso, or to discharge at Callao, was a political decision taken by the government of the Republic of Cuba for political and non-commercial reasons".

But, after examining the relevant facts, he goes on:

> "Does this call for characterization of the act of the Republic of Cuba in withdrawing Playa Larga and denying the cargo to its purchasers as done 'jure imperii'? In my opinion it does not. Everything done by the Republic of Cuba in relation to Playa Larga could have been done, and, sof far as evidence goes, was done, as owners of the ship; it had not exercised, and had no need to exercise, sovereign powers. It acted, as any owner of the ship would act, through Mambisa, the managing operators. It invoked no governmental authority ..." (p. 320).

And he adds:

> "It may well be that those instructions would not have been issued, as they were, if the owner of the Playa Larga had been anyone but a state; it is almost certainly the case that there was no commercial reason for the decision. But these

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23 The other Cuban vessel involved, the Marble Islands, raised other considerations, and on the legal effect of these there was a difference of opinion amongst their Lordships; but what I have described of this case is sufficient for my present purposes.

> consequences follow inevitably from the entry of states into the trading field. If immunity were to be granted the moment that any decision taken by the trading state were shown to be not commercially, but politically, inspired, the 'restrictive' theory would almost cease to have any contents and trading relations as to state-owned ships would become impossible. It is precisely to protect private traders against politically inspired breaches, or wrongs, that the restrictive theory allows states to be brought before a municipal court." (pp. 268-269)

This was a case of commercial acts for commercial purposes, but changing later into purposes mainly if not solely political. The decision of the House of Lords on these facts has not escaped criticism; but it is in this writer's opinion strictly correct. Certainly the acts of the Cuban authorities in preventing the Playa Larga from delivering her cargo of sugar in accordance with the requirements of a commercial contract, were acts manifestly wholly inspired by political purposes. But, as we have already seen, the purposes test has been rejected. One must look at the legal nature of the act and ask whether it could have been done by a private person. The answer in this case appears to be that all the acts in question could indeed have been done by a private person (which is not of course to say that they would not have been in breach of contract - the proceedings were interlocutary and concerned with jurisdiction, not with trial of the action). The key words of Lord Wilberforce, which explain the decision, are in that sentence already quoted above: "Everything done by the Republic of Cuba in relation to Playa Larga could have been done, and, so far as the evidence goes, was done, as owners of the ship; it had not exercised, and had no need to exercise, sovereign powers" (emphasis added)[24].

In thus deciding, even in a case which might be said to be on the very border line, the court was not at all tempted, apparently, to make use of any notion of which is the rule and which the exception; the

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24 It is instructive to compare this finding on the nature of the acts in question, with the example given by Goff J. (as he then was) mentioned in note 22 above. 'Seizure' of strategic materials would be a sovereign act, for a private person, even as owner of the vessel, could not do that. There is thus no discrepancy between that argument and the decision of the House of Lords.

'private law', or 'commercial', jurisdiction was regarded as autonomous and as of equal standing with the immunity rule. The matter is no longer cast in terms that a State, in voluntarily entering into private-law commercial transaction, may be regarded as having tacitly agreed to submit to the jurisdiction, thus making it a sort of jurisdiction by consent. It is a decision that a State's commercial relations are subject to the jurisdiction, and that this rule may prevail even where the State subsequently frustrated the commercial transaction for reasons of foreign policy, provided always that the frustrating actions were steps that could have been taken by a private person party to a like relationship. The Court did not purport to have jurisdiction over acts jure imperii much less to decide whether acts done under the jure imperii were lawful or not in international law. It was concerned solely with acts of the defendant which were acts that a private trader might have performed.

Perhaps we may now draw certain conclusions about the general shape of jurisdictional immunity, as a result of these tendencies of municipal jurisprudence and legislation. It should surprise nobody that the question whether jurisdictional immunity exists, arises only when there has been a positive answer to the logically prior question whether there exists a jurisdiction in which the immunity can operate. Nor is it surprising that formerly, when there was a less restricted view of the immunity than now generally obtains, the prior question was easily lost sight of, because immunity offered an answer in limine, by which all other possible questions could be disposed of. Courts always, and reasonable, jump straight to any answer that promises to be conclusive. Nevertheless, it seems now clear enough that, in the words of Sir Ian Sinclair[25], it is the principle ot territorial sovereignty that is dominating; or, as it is put by Professor Higgins,[26]

"It is very easy to elevate sovereign immunity into a superior

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25 Above at p. 12 .

26 Op. cit. at p. 271.

> principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction. It is a derogation from the normal rule of territorial sovereignty. It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity".

There is of course the not inconsiderable difficulty that the European Convention expresses immunity as a general rule, and the cases where it does not apply as exceptions; this was appropriate in an instrument which needed to define those cases of non-immunity which are so clear and generally acceptable that they could be articulated with an international process of enforcement of acceptance and faithful execution of domestic judgments given against parties to the treaty and in accordance with the treaty. But the method also, as Sinclair points out, is designed to establish a jurisdictional link, which is the essential basis of the fulfilment undertaking. However, the United States, the United Kingdom and the Australian legislation also follows the pattern of having the non-immunity cases expressed as exceptions to a general rule of immunity (the U.K. Act of course much influenced by the European Convention). This, however, is a method appropriate to municipal legislation. Municipal legislation is not concerned to lay down the international law rule of immunity which, as mentioned above, must lay down the limits beyond which municipal jurisdiction ought not to be exercised; that is to say, the situations in which immunity must be granted. Beyond those limits, municipal laws vary greatly and it is entirely in accord with the international law rule that they should. Accordingly, municipal legislation, by making, for that law, a general rule of immunity, is able to formulate those cases where jurisdiction will be exercised. Obviously those cases where jurisdiction will be exercised, and immunity refused, will be somewhat different as a result say of the United States Act from the effect of the United Kingdom Act. This matters not, provided neither results in the exercise of jurisdiction in a case where international law requires immunity to be allowed.

It may, indeed, not be a matter of great moment which situation is expressed in such instruments as the rule and which as exceptional for the

purposes of the instrument. Burden of proof, though sometimes useful in relation to facts, is not very helpful or even opposite when it is a matter of proving not so much facts but how the law stands. In any event, it must always be true that the question of immunity cannot even arise unless there were otherwise competence to pass judgment. It remains true that territorial jurisdiction is the dominating principle.

Is all this more than a theoretical argument about the validity of modes of exposition? It is submitted that it is very much more, and for the following reason. The area of non-immunity shows every sign of becoming rather more than a somewhat narrowly defined group of "commercial" activities of a foreign government. The nature of the act test - rather than its purpose - has led to the potentially much wider test that a defendant State is subject ot the jurisdiction wherever it has acted as a private person might act; and if we follow the House of Lords in the I Congreso case, this is so even if those acts which a private person might have done were manifestly done for reasons of State policy in foreign relations.

In short, the tendency of municipal courts appears now to be positively to assert jurisdiction over a foreign State defendant, in an area which corresponds potentially at least to the normal private law jurisdiction of those courts. Certainly there must always be certain cases where immunity must be recognized (the personal immunity of the visiting Head of State, the immunity of foreign warships within the jurisdiction, and so on); and of course execution of a judgment is a separate matter. Thus the "restricted" view of immunity is something of a euphemism for a greatly expanded view of a municipal court's jurisdiction over a foreign State defendant, and entirely irrespective of any question of consent in the form of waiver.

There are two things now to be said about these developments. The first is that the solution of the jurisdictional immunity problem towards which there seems at present to be a strong tidal flow, is coming to look much more like the limited view of immunity advocated by the late

Sir Hersch Lauterpacht over 30 years ago; in effect a restricted list of cases of immunities of a functional character which, in his view, even then would have satisfied the requirements of international law. Second, it is time to return to the point where we began, and to wonder at this successful expansion of the jurisdiction of municipal courts over foreign States, as we compare it with the still absolute doctrine of immunity (though here softened in expression as the consensual principle of jurisdiction) enjoyed by those same States before international courts applying international law. This is not without irony in what may in somewhat loose shorthand be called the act-of-state kind of case or, as English courts prefer, cases involving principles of judicial restraint or propriety. Here, before a municipal court, there is normally no question of immunity[27]. The municipal court will nevertheless, as a matter of judicial propriety, refuse to adjudicate upon the applicability of foreign legislation within that foreign State's territory, or upon the transactions of foreign States under international law[28]. Now this, as we have already said, whether it be called judicial propriety or act of State doctrine, is a straight question of jurisdiction, rather than immunity. It is in effect a decision that the matter is either one for the jurisdiction of the foreign State in question, or of an international tribunal. But if it be sought to be referred to an international court, there will be no jurisdiction without consent; or, in the language used of municipal jurisdictions, there will still be absolute immunity unless (by treaty or otherwise) there has been a waiver of immunity. It is not the purpose of this article to explain why it is that municipal courts have been so remarkably successful in asserting that foreign sovereign governments are subject to their jurisdiction when they come, as private

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27 See e.g. Lord Wilberforce in Buttes v. Hammer (1982) A.C. 888, at p. 926 (I.L.R. Vol 64, p. 339): "The doctrine of sovereign immunity does not in my opinion apply since there is no attack, direct or indirect, upon any property of any of the relevant sovereigns, nor are any of them impleaded directly or indirectly".

28 See e.g. Lord Wilberforce, loc. cit., pp. 931 ff. See also Brownlie, in his report to the Institut de Droit International (see Annuaire, Vol. 62, BK. I (1987), p. 55), has a criterion indicating the incompetence of the legal system of the forum, "... transactions of sovereign States in terms of public international law ...".

persons might, within the territorial law, whilst international courts have remained subject to an absolute consensual theory when the matter is properly within their jurisdiction. But it may be useful to call attention to the difference. It need cause no particular surprise that States have, on the whole, been reluctant to restrict their immunities in regard to the proper jurisdiction of international courts; the contrast, however, between the position before international courts and the position already attained by municipal courts in asserting their proper jurisdiction even over unwilling State defendants, is striking.

So now we have a somewhat curious situation. The principle of a State's jurisdictional immunity (or consensual jurisdiction) is still virtually absolute in its application before international courts, but has apparently come to be importantly, even severely, restricted in its application before domestic courts. Moreover, the plaintiff who may thus sue a foreign sovereign State, or its government, in the domestic court, applying local law, will probably be an individual or a corporate body, neither of which would have the locus standi, to appear at all, whether as plaintiff or defendant, before the International Court of Justice, because of the provision in Article 34 of the Court's Statute that only States may appear before it. The position we now seem to have reached, or be tending towards, is that the State of Utopia may never, without its prior consent, be impleaded before the International Court of Justice on a question of public international law; and yet may be both impleaded by an Atlantis court applying Atlantis law in a case brought by a foreign individual.

One explanation is no doubt again one relating to jurisdiction: the competence of an international court has to be created, or shown to exist, for each particular case. The jurisdictional immunity is absolute until the existence of an exception is demonstrated. Moreover, such exceptions as do exist, resulting in so-called compulsory jurisdiction, have been based inevitably upon securing consent to it, by treaty or otherwise. But it is also worth observing that it is not a mere coincidence that the area where sovereign States have become subject to a

significant scope of compulsory jurisdiction without a specific waiver, is an area where the court in question is an instrument of a particular territorial sovereignty[29]. For competence, both juridically and physically in respect of persons and property within the territory of the forum is the normal basis of curial power and ultimately therefore of curial authority. The reason that makes this exercise of jurisdiction against States a practicable as well as a seemingly acceptable one, is that the court has an authority in respect of persons, or agents, or premises, or assets of the defendant which are present in, or have a strong connection with, the territory in question. The municipal court, and the local law it administers, in this situation, has a source of peculiar appropriateness, authority and practicality, which an international court by its very nature lacks[30]. All this, moreover, the municipal court enjoys quite apart from the question of any procedures for enforcement of judgments, where, in perhaps most jurisdictions, the immunity will again come into play.

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29 In speaking of the importance of the territorial link of both municipal court and its law, it should perhaps be mentioned that municipal courts sometimes exercise extraterritorial jurisdiction and sometimes apply foreign law; but in both instances it does so in accordance with the requirements of the territorial law of the forum. Nor of course should it be lost sight of that there can be a game of forum shopping even in matters of immunity; on this see Green, International Law (3rd ed. 1987), p. 155.

30 See the present writer, The Judicial Enforcement of International Obligations, in: ZaöRV, Vol. 47 (1987), pp. 3-16. By international court is here meant of course a court for adjudicating between States in matters of public international law ; and not, e.g. tribunals for commercial arbitration, which present quite different problems.